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Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 809

MARY GAREE and COSTA B. GAREE,
(Plaintiffs) Respondents,

vs.

EDWARD McDONELL,
(Defendant) Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION and BRIEF.

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In The

Supreme Court of the United States

October Term, A. D. 1940.

No.

MARY GAREE and COSTA B. GAREE,
(Plaintiffs) Respondents,

vs.

EDWARD McDONELL,
(Defendant) Petitioner.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION.

To the Honorable:
The Supreme Court of the United States.

Your petitioner, Edward McDonell, respectfully petitions the Court for a writ of *certiorari* to be issued from this Court to the United States Circuit Court of Appeals for the Seventh Judicial Circuit of the United States to reverse a judgment of that Court affirming a judgment of

the United States District Court for the Southern District of Illinois, Southern Division, in favor of the respondent, Mary Garee, for the sum of $3,000.00 and in favor of the respondent, Costa B. Garee for $690.00 against the petitioner, and also to reverse said judgment of the trial court.

JURISDICTION.

This suit was begun August 20, 1938, by respondents, citizens of the State of Ohio, against petitioner, a citizen of Illinois, residing in Bloomington in the Southern Division of the Southern District of said State, by complaint filed in the District Court to recover damages alleged to have been suffered by respondents through the negligent driving by petitioner of his automobile near Sabetha, Kansas, causing a collision between petitioner's and respondents' automobiles. Each respondent claimed $15,000.00 damages for personal injuries and respondent, Costa B. Garee, claimed $1,500.00 damages for injury to his motor vehicle (Tr. 2-10; R. 3-12). Trial was had in the District Court before a jury on October 23-26, 1939 (Tr. 35, 145; R. 55, 57). Verdict of jury for $3,000.00 in favor of respondent, Mary Garee, and for $690.00 in favor of respondent, Costa B. Garee, and judgment for same against petitioner (Tr. 146; R. 58). Appeal was taken and perfected from said judgment to the United States Circuit Court of Appeals for the Seventh Circuit (Tr. 152, 154; R. 70, 73). A hearing was had in that Court and said Court rendered a judgment on December 11, 1940, affirming the judgment of the trial court (116 Fed. (2nd) 78). Prior to March 10, 1941, petition for *certiorari* was filed with the Clerk of this Court. The jurisdiction of this Court is invoked under Section 240A as amended of title 28 (now Section 347A) and Section 350 of title 28 of the United States Revised Statutes.

The question involved herein is of the utmost importance due to the large number of suits arising out of automobile accidents wherein one or more of the parties carry liability insurance. It is submitted that the gravity of the decision sought to be reversed, arises out of the chaotic maelstrom of decisions which construe the use in evidence of the insurance factor. There is a conflict between the decision in the case at bar and the decisions of other Circuit Courts of Appeals and the State Courts of Illinois on the same matter. (*Stewart & Company* v. *Newby,* 266 Fed. 287, 295; *Brooke* v. *Croson,* 58 F. (2nd) 855; *Clark* v. *Hasselquist, et al.,* 304 Ill. App. 41, 46, 47, 48; *Bishop* v. *Chicago Junction Ry. Co.,* 289 Ill. 63, 67; *McCarthy* v. *Spring Valley Coal Co.,* 232 Ill. 473, 479.)

QUESTION PRESENTED.

In an action to recover damages for petitioner's alleged negligence in an automobile collision where the evidence on both sides is close and conflicting, should a substantial verdict against petitioner and in favor of respondent, induced by proof that petitioner was insured, be permitted to stand?

STATEMENT.

This suit was commenced and concluded as shown herein under the sub-head of Jurisdiction. The evidence of liability and non-liability was close and conflicting (Tr. 113-118; R. 179-186). The main reason urged for a reversal of both judgments, was the denial by the trial court of petitioner's motion to withdraw a juror and continue the cause on account of the injection into the case by respondent's evidence that petitioner was insured and other prejudicial and incompetent evidence (Tr. 148; R. 61) by reason of which the verdicts of the jury were the result of prejudice and passion and not based upon competent evidence (Tr. 148-149; R. 62). Petitioner's chief

contention in the Circuit Court of Appeals was, that up to the time when petitioner's motion to withdraw a juror and continue the cause was denied, prejudicial evidence of insurance had been submitted to the jury without any waiver of the same on the part of petitioner. Petitioner urges that this portion of the record discloses that the trial court erred in failing to declare a mistrial.

On the trial of the case before a jury, after preliminary questions to the first witness and outside the hearing of the jury, there was a colloquy between Court and counsel whereby all connected with the case were warned, more or less, to avoid presenting to the jury any evidence that petitioner was insured against automobile accidents (Tr. 36; R. 80). Immediately counsel for respondent asked the witness: "Do you remember Mr. Pautz, insurance man at Sabetha?" (Tr. 37; R. 82). Then questioned the witness about going to the telegraph station at Sabetha after the accident with the insurance man and composing a telegram and sending it to respondent's insurance company, and repeatedly asking questions and receiving answers concerning insurance and the insurance company under the guise of having the witness tell what was contained in the telegram, and that petitioner stated the collision was petitioner's fault (Tr. 38-39; R. 83, 84, 85). Again, attorney for respondent asked: "In sending this telegram to the insurance company, did you tell them you had a serious accident?" (Tr. 39; R. 85).

Sometime after the accident, respondent and petitioner met at petitioner's home in Bloomington, Illinois, and over objection, the witness was requested to detail the conversation concerning propositions for settlement of the case bandied back and forth between petitioner and respondent, and how much respondent wanted for a set-

tlement that was never consummated, wherein evidence of petitioner's having been insured against automobile accidents was again presented to the jury (Tr. 41; R. 87). In respondent's testimony, the matter of petitioner's insurance was repeatedly testified to (Tr. 43-48; R. 90-97). This colloquy between the trial court and counsel for petitioner occurred: Petitioner's Attorney: "If the court please, I want to call your Honor's attention to the fact that notwithstanding the understanding with all of us that the matter (insurance) was not to be brought out, they constantly ask questions to bring out the thing that they agreed not to bring out." Then the trial court said: "That is true, it is out in the open so far as that is concerned and there is no way the court can avoid it" (Tr. 40, 41, 42; R. 86, 87). After the details of an attempted settlement between the parties were shown and an objection was sustained to another question, respondent's attorney said (outside the presence of the jury): "May the record show in our exception to the court's ruling to this last question, that we expect the answer to be that it was suggested by either the insurance company's adjuster or the lawyers" (Tr. 41; R. 87).

Thereupon petitioner moved the Court to withdraw a juror and continue the cause on account of respondent's prejudicial injection of petitioner's liability insurance into the case (Tr. 42; R. 88). Motion was overruled. Petitioner made a motion for a new trial on account of the admission of the testimony on behalf of respondents and permitting respondent to get before the jury information to the effect that petitioner was insured. Motion for a new trial was denied (Tr. 148, 149, 151; R. 61, 63, 68). The same matters were assigned for error in the Circuit Court of Appeals (Tr. 153; R. 215).

REASONS FOR ALLOWANCE OF WRIT.

I.

The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on the same matter and decides an important question of a local law in a way probably in conflict with applicable decisions.

II.

The evidence upon the subject of petitioner's negligence and the contributory negligence of respondent was conflicting and petitioner had the right to have that issue fairly submitted to the jury uninfluenced by any other issue.

III.

The evidence and questions concerning the petitioner's liability insurance did not tend to prove any matter properly before the jury and was produced by repeated and purposeful questioning by respondents' attorneys and caused the substitution of the issue of liability insurance for the issues of negligence and contributory negligence.

IV.

Although repeatedly warned by the trial court to refrain from producing before the Jury evidence of petitioner's liability insurance, respondents repeatedly violated the warning and asked questions calculated to produce that evidence, and directly referred in their questions to petitioner's insurance. Showing counsel's purpose to accomplish that result, respondents' attorney stated: "* * * we expect the answer to be that it was suggested by either the insurance company's adjuster or the lawyers" (Tr. 41; R. 87).

V.

The injection of the false issue was not information innocently volunteered or produced by accidental means or by inadvertence.

VI.

The failure of the trial court to allow petitioner's motion to withdraw a juror and continue the cause, and again to allow petitioner's motion for a new trial and follow the same by judgment and the affirmance of that judgment by the Circuit Court of Appeals, has deprived the petitioner of a trial of his case upon the issues made by the pleadings therein.

Wherefore, petitioner prays that the writ of *certiorari* be awarded to the end that the judgments of the Circuit Court of Appeals and the United States District Court may be reversed and the cause remanded to the latter Court for a new trial upon the issues made by the pleadings.

Respectfully submitted,

FRANK K. LEMON,
Attorney for Petitioner.

BRIEF.

I.

If it is the intention of the courts to grant a fair and impartial trial upon the issues presented by the pleadings in a civil action, it is prejudicial and reversible error for the trial court to permit the respondent, especially after warning, to introduce evidence of the fact that the petitioner carried insurance against automobile accidents and collisions.

Stewart & Company v. *Newby,* 266 Fed. 287, 295;

Brooke v. *Croson,* 58 F. (2nd) 885;

Clark v. *Hasselquist, et al.,* 304 Ill. App. 41, 46, 47, 48;

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Curran v. *Lorch,* 243 Pa. 247, 90 A. 62;

George A. Fuller Co. v. *Nicholas J. Darragh,* 101 Ill. App. 664;

Briggs v. *Golden Cream Dairy,* 298 Ill. App. 628, 19 N. E. (2nd) 126;

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F. W. Woolworth Co. v. *Davis,* 41 F. (2nd) 342;

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Gose v. *Ballard,* Court of Civil Appeals of Texas (1928), 12 S. W. (2nd) 1067;
Osgood v. *Chicago & N. W. R. R. Co.,* 253 Ill. App. 465 at 467.

II.

In the case at bar, where the evidence of negligence and want of ordinary care was conflicting, and a verdict could have been sustained for either side in the absence of countervailing evidence, the rulings of the trial court should have been accurate and the injection of false issues should work a reversal of a judgment obtained thereby.

2 *R. C. L.* 253, Sec. 206;
Anlicker, et al. v. *Brethorst, et al.,* 329 Ill. 11, 160 N. E. 197;
Sertaut v. *Crane,* 142 Ill. App. 49;
New York Central R. R. Co. v. *Stevens,* 126 Ohio 395, 185 N. E. 542.

III.

The first testimony concerning petitioner's insurance against automobile accidents was introduced in an attempt to get an admission from petitioner that he said the collision was his fault. Petitioner could have been asked directly about this conversation without any evidence of petitioner's insurance getting before the jury. The next circumstance used as a vehicle to put the fact of petitioner's insurance before the jury was elicited by questions concerning an attempted settlement of the case, not consummated, together with evidence that respondents desired $4,000.00 damages. This was clearly incompetent and highly prejudicial.

Home Ins. Co. v. *The Baltimore Warehouse Co.*, 93 U. S. 527, 548 (23 L. Ed. 868, 871);
Garber v. *Levine*, 250 Mass. 489, 146 N. E. 21;
Outlook Hotel Co. v. *St. John*, 287 F. 115;
Arnold v. *Owens*, 78 F. (2nd) 495.

IV.

A verdict tinged with passion and prejudice is void in its entirety.

Nicholson & Sons v. *O'Donald*, 79 Ill. App. 195 at 200;
West Chicago St. R. R. Co. v. *Johnson*, 69 Ill. App. 147, 157;
Lowenthal v. *Streng*, 90 Ill. 74;
Chicago & N. W. Ry. Co. v. *Cummings*, 20 Ill. App. 333.

"Generally, where prejudicial error has been declared, it is found to have been due to some misconduct, or improper remarks, or questions of counsel, oft times repeated and calculated to influence or prejudice the jury."

Williams v. *Consumer's Co.*, 352 Ill. 51.

V.

The overwhelming weight of authority in almost every jurisdiction supports the contention that instructions on insurance, such as the trial court gave in the case at bar (Tr. 136) only make more emphatic the evil intended to be cured. As is noted in some of the cases, this has also been held applicable to objections of testimony.

Marrigold v. *Black River T. Co.*, 80 N. Y. Supp. 861, 862;
Wiersema v. *Lockwood & S. Co.*, 147 Ill. App. 33;
Rothenburg v. *Collins*, 146 N. Y. Supp. 762;
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Taggart v. *Keebler*, 198 Ind. 633, 154 N. E. 485;
Trent v. *Lechtman Printing Co.*, 141 Mo. App. 437, 126 S. W. 238;
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Stoskoff v. *Wickland*, 49 N. D. 708, 193 N. W. 312;
Wilson v. *Wesler*, 160 N. E. 863;
Yoast v. *Sims*, 122 Okla. 200, 253 Pac. 504;
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Levinski v. *Cooper*, 142 S. W. 959;
Birch v. *Abercrombie*, 74 Wash. 486;
Wilkins v. *Schwartz*, 101 W. Va. 337, 132 S. E. 887.

FRANK K. LEMON,
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TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

ROCKER & SCHWARTZ,
Cleveland, Ohio,

HOWARD L. DOYLE,
Decatur, Illinois,

MARKS ALEXANDER,
Springfield, Illinois,

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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OPINIONS BELOW.

The District Court's Memorandum On Motions To Set Aside Verdicts And For New Trial is not reported. (R. 170-172.) The opinion of the Court of Appeals (R. 175-178) is reported in 116 Fed. (2d) 78.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 13, 1940. (R. 175.) The petition for a writ of certiorari was filed prior to March 10, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The question assigned by the petitioner is not the exact question presented by the record. Respondents deem the question raised by the record to be as follows:

Whether the trial court should have declared a mistrial because of the admission of evidence concerning petitioner's insurance, such evidence having been disclosed by the proof of a material issue properly in the case and by the innocent volunteering of such information by a witness; and in further consideration of the fact that the subject of petitioner's insurance was introduced by the petitioner himself, that the petitioner (and cross-plaintiff) in his own testimony brought out that the respondent was likewise insured and that the court in its instruction to the jury cautioned that there was no question of insurance in the case.

STATEMENT.

The facts may be summarized, as follows:

As the result of an automobile accident, respondents Mary Garee and Costa B. Garee brought suit to recover damages for the injuries thereby sustained and alleged to have resulted from the negligence of petitioner, Ed. McDonell. (R. 2.) The latter filed a counterclaim for damages to his own car. (R. 21.) Petitioner's wife and sister-in-law, who were passengers in his car at that time, obtained leave to intervene and file counterclaims for damages for their injuries also alleged to have arisen out of the negligence of Garee. (R. 16.)

The question as to McDonell's insurance was raised at the very outset of the trial by colloquy outside the hearing of the jury. Respondents had served a subpoena duces tecum upon the custodian of a certain telegram said to have been sent by McDonell to his insurance company the morning after the accident, in which he admitted liability

for it. (R. 32.) The court ruled that the telegram might be admitted in evidence without disclosing to whom it had been sent, in order to avoid letting the jury know that appellant was covered by insurance. He cautioned both sides to avoid any reference to the insurance company. Whereupon counsel for petitioner said that they could not in their defense keep from referring to it. (R. 36.)

The first witness called by respondents was petitioner, who was asked questions tending to show how the accident happened, and his admissions of liability at that time. (R. 37.) In reply to a question as to whether anyone helped him prepare the telegram, he stated that he and the others present talked about it, and he said he wanted to send it to the insurance company so they would give them some help. (R. 38.) This was the first mention of the matter of insurance in the presence of the jury, and petitioner's own counsel made no objection to it. Petitioner made several more voluntary references to the insurance company (R. 41), and one to "my company" (R. 39) during the course of his examination by counsel for respondents.

Counsel for petitioner finally interposed an objection to a question as to a conversation at petitioner's home, directed to its materiality. (R. 40, 41.) He also objected to a question as to whose idea it was that McDonell was to make a claim against Garee, which was sustained by the court after argument outside the hearing of the jury. (R. 41.) He then made a motion to withdraw a juror and declare a mistrial on the ground that the primary purpose of cross-examining petitioner had been to bring out the fact that petitioner carried insurance. (R. 42.) The motion was overruled.

On cross examination respondent Costa Garee was asked by petitioner's counsel whether he took the name of petitioner's insurance company after the accident.

Petitioner, in his own testimony, brought out that he was insured and that the respondent was likewise insured.

(R. 110.) The matter of insurance was referred to by petitioner's counsel in his closing argument. (R. 144.) The court in its instructions to the jury told them that there was no question of insurance in the case. (R. 136.)

The jury returned verdicts for the respondents. The jury also found that respondent Costa B. Garee was not guilty as to the cross-complaints, and not guilty as to the counterclaim of petitioner, Ed. McDonell. (R. 145.)

The proceedings which occurred thereafter are set forth on page 2 of the petition.

SUMMARY OF ARGUMENT.

1. The question presented by the record in this case is, briefly, whether the trial court should have declared a mistrial because of the admission of evidence concerning petitioner's insurance, such evidence having been disclosed by the proof of a material issue properly admissible, and by the volunteering of such information by a witness. The lower court properly held that the general rule making it error in the trial of an action for personal injuries to permit the plaintiff to introduce evidence to show the defendant is protected by insurance is subject to qualifications and exceptions, two of which are (1) that such evidence may be used to prove some material issue properly in the case, and (2) that the disclosure of such evidence is not a basis for reversal of the verdict and judgment where innocently volunteered by a witness.

2. The question presented by petitioner—whether a verdict against petitioner and in favor of respondent, induced by proof that petitioner was insured, should be permitted to stand—was not the exact question decided by the lower court. The lower court recognized the general rule as to the inadmissibility of evidence tending to inform a jury of liability insurance, but the court also recognized the above mentioned exceptions thereto, and determined that the record disclosed that the issue before it was deter-

minable by such exceptions and not the general rule. Furthermore, the question framed by petitioner obviously contemplates the application of the general rule which has had almost uniform application, and which has not given rise to conflicting decisions. Therefore, the question posed by petitioner is not of that character which this Court will review on writ of certiorari.

3. Where the evidence amply warrants a verdict and the amount thereof, there is no occasion to order a reversal on an unsupported assumption that the jury were by passing references to insurance rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict. Where both parties are shown to have carried insurance under the conditions above stated, such an assumption would be an absurdity.

ARGUMENT.

1. It is not difficult to defend the opinion of the Circuit Court of Appeals. That court held that the rule as to the inadmissibility of evidence tending to inform a jury of liability insurance is not an inflexible one. While such evidence is ordinarily not admissible, it may be used to prove some material issue properly in the case, and the fact that it is not admissible to prove another matter does not render it incompetent. Hence, the court held, the telegram sought to be introduced was clearly admissible to prove petitioner's admission of liability. That it could have been introduced without showing that insurance was involved does not change the situation in view of petitioner's part in opening up the subject. And another exception, the court said, arises when the information is innocently volunteered by a witness. (R. 178.)

Consequently, it appears that the court had before it the question whether the record disclosed an instance for the application of the general rule or for the exceptions thereto. The court resolved that question in favor of the

application of the exceptions. That conclusion finds support in the Record.

The Supreme Court of Illinois, together with the federal and most state courts recognize the exceptions to the general rule.

In *Williams v. Consumers Co.*, 352 Ill. 51, 185 N. E. 217, an action for personal injuries received in an automobile accident, a witness made a remark tending to show defendant was insured. Defendant's counsel moved to withdraw a juror and have the court declare a mistrial. The motion was denied. In the Supreme Court of Illinois the defendant urged the court to reverse the judgment for plaintiff on the ground that the motion should have been granted. The court affirmed the judgment. Defendant cited a number of Illinois decisions in support of the proposition that the injection of the evidence of insurance at the trial was grounds for reversing the case. At page 55 of the opinion, the court said:

> "We have examined these cases but find none where a mistrial has ever been granted on account of an inadvertent or unresponsive answer of a witness to a legitimate inquiry. Generally, where prejudicial error has been declared it is found to have been due to some misconduct or improper remarks or questions of counsel ofttimes repeated, and calculated to influence or prejudice the jury."

In *Stilson v. Ellis*, 208 Ia. 1157, 225 N. W. 346, plaintiff brought the action to recover damages for personal injuries through the negligence of defendant. After trial to a jury there was a verdict for plaintiff, and the defendants appealed on the ground, among others, that there was injected into the record references to the fact that defendant carried liability insurance. Witnesses brought the matter before the jury by relating conversations that took place in defendant's home immediately after the accident

The defendant herself made statements regarding this insurance. The Supreme Court of Iowa held that whatever may have been said in reference to insurance did not require a reversal of the judgment below. At page 1169 of the opinion, the court said:

> "Assuming that what was said by the Ellises (defendants) at that time was admissible as an admission against interest (as the record seems to show), it cannot be complained because a part thereof referred to the liability insurance. Admissions against interest are such even though they may embody information concerning insurance carried by the declarant. This conversation aforesaid was innocently related by the witnesses upon the stand, apparently without any thought of injecting prejudicial subjects into the record. The trial court by special instruction, told the jury the following: 'Any evidence introduced concerning insurance is withdrawn from your consideration, and you are directed to disregard such testimony and not to discuss the same, nor allow it to influence your verdict.' "

In *Ward v. DeYoung,* 210 Mich. 67, 177 N. W. 213, the Supreme Court of Michigan held that in an action for injuries suffered by a cyclist, who was run down by defendant's motor car, the admission of evidence showing an admission of liability by a defendant was proper, even though defendant in making such admission stated he carried insurance. At page 76 of the opinion, the court said:

> "The fact that a defendant is so insured should not render him immune from having his admissions used against him when favorable to plaintiff, and, if in placing before the jury a statement made by him, or conversation indulged in, which tends to show such admissions, it appears as a part thereof that he is so protected, he has only himself to blame therefor."

No purpose would be served burdening this brief with a detailed analysis of more cases which support the exceptions to the general rule. Suffice it to say that prac-

tically all jurisdictions have recognized these qualifications, and exceptions, and the same have been approved by bench and bar; the tendency to relax the general rule becoming more evident. *Jupallo P. S. Co. v. Grant,* 42 Fed. (2d) 18 (C. C. A. 4th); *Hazeltine v. Johnson,* 92 Fed. (2d) 866 (C. C. A. 9th); *Jessup V. Davis,* 115 Neb. 1, 211 N. W. 190; *Bauer v. Reavell,* 219 Iowa 1212, 260 N. W. 39; *Meinecke v. International Transp. Co.,* 101 Mont. 315, 55 P. (2d) 680; *Goodale v. Hathaway,* 149 Or. 237, 39 P. (2d) 678; *Anderson v. Drackworth,* 162 Mass. 251, 38 N. E. 510; *Flieg v. Levy,* 148 App. Div. 781, 133 N. Y. Supp. 249, affirmed in 208 N. Y. 564, 101 N. E. 1102; 105 *A. L. R.* 1326, 1327; 95 *A. L. R.* 398, 399; 74 *A. L. R.* 856, 858; 56 *A. L. R.* 1448, 1451; *Couch Cyclopedia of Insurance Law,* Vol. 8, pp. 7371-7385; *Wigmore on Evidence,* Vol. 2 (3rd Edition) pp. 133-150.

2. Petitioner contends at page 3 of his petition that there is a conflict between the decision in the case at bar and the decisions of other Circuit Courts of Appeals and the State Courts of Illinois on the same matter. Thereby petitioner attempts to invoke the jurisdiction of this Court. However, no such conflict exists. The cases which petitioner cites represent authority for the general rule excluding evidence of a liability insurer. None of them deal with the exceptions to the general rule.

Petitioner cites *Stewart & Co. v. Newby,* 266 Fed. 287 (C. C. A. 4th). In that case the attorney for the plaintiff, over objection of opposing counsel, repeatedly attempted to prove that defendant was protected by insurance, and that the Accident Insurance Company was liable for whatever damages might be recovered in the case. This evidence was not excluded until the conclusion of the whole testimony. Unlike the case at bar the evidence of insurance did not appear by an admission of liability in a telegram or other document which would clearly be within the exception and

admissible. Also, unlike the instant case, in the *Newby* case counsel for plaintiff repeatedly attempted to prove the insurance protection, whereas here counsel for plaintiff sought only to prove that a telegram had been sent by defendant which admitted the liability. This same Circuit (4th) has approved the exception to the general rule in favor of voluntary statements and admissions against interest in *Jupallo P. S. Co. v. Grant*, 42 Fed. (2d) 18.

Petitioner cites *Brooks v. Croson*, 58 F. (2d) 885 (C. A. D. C.). In that case, another one which supports the general rule and does not present facts which would occasion the application of the exceptions thereto, the trial court did not exclude testimony that the defendant was insured, failed to caution the jury concerning it, and permitted its submission as evidence "to be considered by the jury, along with the other evidence in the case." The court held that the instruction was a distinct violation of the general rule inasmuch as it treated the plaintiff's testimony relating to the existence of liability insurance as substantive proof tending to establish the charge of negligence against defendant. Thus, the holding of this case, too, is not controlling in the case at bar, because it does not deal with exceptions to the general rule and because the lower court in the case at bar did not permit the evidence of insurance to be submitted as proof of negligence.

Petitioner cites in support of his position the case of *Clark v. Hasselquist*, 304 Ill. App. 41. In that case the plaintiff, by the questions asked and by the final argument of his counsel, succeeded in apprising the jury he was interviewed by a party who was investigating the case for the defendant, and for his attorneys, and for the Travelers Insurance Company, and that the investigator's purpose in procuring a statement from plaintiff was to help the Insurance Company. The Supreme Court held that the inquiry was for no other purpose than to disclose to the jury

that defendant was protected by liability insurance. Unlike the case at bar, in the *Clark* case the insurance factor was not disclosed in an admission of liability or by voluntary disclosure by the defendant. Furthermore, the final argument of plaintiff's counsel in the *Clark* case was prejudicial.

It may be said of all the cases upon which this defendant relies, that they present factual situations calling for the application of the general rule that evidence of liability insurance is not admissible. As such, these cases cannot be determinative of the case at bar because this case comes within the qualifications and exceptions to that rule.

In any event, it is quite clear that there is no conflict in these decisions, as claimed by petitioner. Each supports the general rule. And it is readily apparent that the cases upon which petitioner relies are not in conflict with the opinion of the Circuit Court of Appeals in this case, for the reason that the case at bar presents a situation which makes necessary the application of exceptions to the general rule. The exception to a rule of law is not in conflict therewith.

3. Petitioner claims in his brief that the evidence in the case at bar was close and conflicting and therefore the reference to insurance is the basis for a reversal of the judgment obtained. However, both of the lower courts found that the evidence amply warranted the verdict and the amount thereof. In its Memorandum On Motions To Set Aside Verdicts And For New Trial, the District Court said (R. 171):

> "Over and above all, however, I am well convinced that on the merits the jury's verdict comes just as near speaking the truth as it is possible for a court or jury to arrive at the truth through a haze of conflicting testimony. * * * The Jury's conclusion on this question finds ample support in the evidence. and the amount of damages allowed is well within the evidence. The

jury was called upon to render five separate verdicts and whatever may be said of the five verdicts they at least have the merit of consistency."

Thus it appears that petitioner's claim that the jury were rendered incapable of fairly considering the facts or of reaching an impartial verdict is entirely based on an unsupported assumption which is not the basis for granting a new trial. This same question was raised in *Hazeltine v. Johnson*, 92 Fed. (2d) 866 (C. C. A. 9th). There, the court said at page 870 of the opinion:

> "There was an impressive showing of want of due care on the part of appellant and the proof amply warrants the amount of the verdict. There is no occasion to order a reversal here on the unsupported assumption that the jury were by this passing reference (to insurance) rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict." See also *Williams v. Consumers Company*, 352 Ill. 51, 185 N. E. 217, *supra*.

Furthermore, in the instant case both parties were shown to have carried insurance. (R. 110.) Under such circumstances it would be an absurdity to assume that the jury were by passing references to insurance rendered incapable of fairly considering the relevant facts or of reaching an impartial verdict.

CONCLUSION.

Respondents submit that the decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals. That the decision is consistent with prior decisions of the Supreme Court of Illinois, federal courts, and other state courts, which have held that the rule as to the inadmissibility of evidence tending to inform a jury of liability insurance is not an inflexible one, since such evidence may be used to prove some material issue properly in the case, or, if innocently volunteered by

a witness, prejudicial error does not result, especially where the one at fault is the complaining party.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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COLONEL G. L. YEARICK,
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(19)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 809

EDWARD McDONELL,
Petitioner,

vs.

MARY GAREE and COSTA B. GAREE,
Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY.

FRANK K. LEMON,
Clinton, Illinois,
Attorney for Petitioner.

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PETITIONER'S REPLY.

Reference is had to the same questions presented by the petition and the response, and particularly to respondents' efforts to minimize the fact that they designedly brought to the attention of the trial jury the evidence that petitioner had liability insurance.

Court and counsel discussed the insurance question out of the presence of the jury at the start of the case and respondents' attorney was particularly warned to omit any reference to the proposition of insurance (Tr. 36). Then respondents' attorney asked:

> Q. "Do you remember Mr. Pautz, insurance man at Sabetha?" (Tr. 37)

Then followed a lot of questions and answers concerning Mr. Pautz, and the respondents, and a telegram the petitioner sent to the insurance company. (Tr. 37 and 38)

Then respondent asked some more questions concerning this telegram to the insurance company wherein petitioner referred to "my company". (Tr. 39)

> Q. "In sending this telegram to the insurance company did you tell them you had a serious accident?" (Tr. 40)
>
> Q. "Tell what the conversation was at your home on the 11th of November, 1937."
>
> A. "The substance of the conversation was, he told me he came over for a settlement and I said, what kind of a settlement do you want to make, Mr. Garee."

After objection, the Court said: "You may answer." So the witness said:

> A. " * * * and I told him, you will have to go and talk to the insurance company." (Tr. 40 and 41)

At this point, the attorney for the petitioner called the Court's attention to the fact that notwithstanding the understanding with all parties that the matter was not to be brought out, they constantly ask questions to bring out the thing that they agreed not to bring out (insurance). (Tr. 41 and 42)

Then counsel for petitioner moved to withdraw a juror and continue the cause because the whole examination of the witnesses seemed to be for the primary purpose of

bringing before the jury the question of petitioner's insurance.

Referring to the time of the accident, respondent testified:

Q. "Will you tell what was said there at that time?"

A. "* * * He said: 'I have insurance and they will take care of you all right.' He said: 'It is a good reliable company and they will take care of you.'" (Tr. 46 and 47)

Q. "I will ask you whether or not anyone wrote any names down there on that occasion, * * *."

A. "I did not have any paper or pencil * * * I asked my wife * * * and she said, 'There is a little bit in the glove drawer' and we got that out and wrote his name down and the license number and insurance company." (Tr. 47)

Q. "Now, was there any conversation there between you and Mr. McDonell on that occasion?"

A. "* * * Mr. Pautz came up and wanted to know something about reporting it to the insurance company. * * * I said, 'Well, you should notify the insurance company'." (Tr. 47)

Q. "Did you hear that? Mr. Garee, you will have to speak up. Will you tell what was said there at that time while you and Mr. McDonell and Mr. Pautz and yourself were together?"

A. "Well, about all I can remember is that Mr. Pautz suggested that Mr. McDonell send a telegram to his insurance company after it was over, taking the blame for the wreck." (Tr. 47)

Q. "At whose suggestion did you go up there?"

A. "Well, Mr. McDonell wanted to send a telegram to his insurance company."

Objection sustained. (Tr. 48)

Q. "What did you hear Mr. McDonell say to Mr. Pautz on that occasion, if anything?"

Respondent: A. "Well, he said it was his fault and he wanted to notify his insurance company." (Tr. 48)

Same witness again referred to petitioner's insurance company. (Tr. 48)

Again the witness Costa B. Garee resumed the stand for further direct examination. After a few questions the trial Court said:

> "This is out of the presence of the jury and at the suggestion of counsel for the plaintiff, the Court asks the witness to avoid any reference to the question of insurance in his answers. You watch that, Mr. Garee, and don't refer to the insurance companies." (Tr. 80)

Notwithstanding the admonitions of the Court, counsel for petitioner asked this question on cross-examination:

> Q. "What were you going to do with the paper?"
> A. "Well, it was to take down Mr. McDonell's number, his name and the company he was insured in." (Tr. 82)

The Court instructed the jury that there was no question of insurance in the case for the jury to determine. (Tr. 136)

ARGUMENT.

Notwithstanding the repeated admonitions of Court and counsel, and the frequent objections made by petitioner, both respondent and respondent's attorney persisted in bringing before the jury, repeatedly and unhesitatingly, the fact that petitioner carried liability insurance. If respondent claimed petitioner had admitted that the accident was his fault, that fact could have been well stated without mentioning liability insurance.

While it is true that in one or two instances petitioner's insurance was mentioned when not called for by the question, most of the questions were calculated to elicit the information of petitioner's liability insurance and were unhesitantly repeated, making the intention of respondent and his attorney clearly apparent. While the trial Court approved the verdict and refused to set it aside, the Court admitted that the evidence was quite conflicting and said in part:

> "The jury's verdict comes just as near speaking the truth as it is possible for a court or jury to arrive at the truth through a haze of conflicting testimony." (Tr. 171)

The case at bar both on the law and facts, is similar to *James Stewart & Co.* v. *Newby,* 266 Fed. 287, 295:

> "The last question in the case relates to the testimony as to the employer's protection by liability insurance. It is true that the testimony was ultimately ruled out. This, however, was not done promptly. Complainant's counsel brought the matter to the attention of the jury almost at the beginning of the trial, and by repeated efforts persistently directed the attention of the jury to it, and it was not until the

conclusion of the whole testimony that it was finally excluded. The general rule is that, where inadmissible evidence has been received during a trial, the error is cured by its subsequent withdrawal, or by an instruction of the court to disregard it." (Citation of cases.) "There is this exception to the rule. Where the evidence admitted is so impressive that in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by the instruction of the court to disregard it, the judgment will be reversed (citation of cases)." " * * * this court must take cognizance of the general recognition among the members of the bar, as well as by the courts, of the harmful effect upon the minds of jurors of such testimony as was here sought to be introduced. The only purpose for which such evidence is presented is to prejudice the jury, and the poison is of such character that, once being injected into the mind, it is difficult of eradication * * *. The authorities are overwhelming that such evidence is inadmissible, that it should be promptly excluded, and that the striking out of the testimony when once admitted does not obviate the necessity for a new trial, if the evidence is so impressive that its effect is not removed by subsequent withdrawal or instruction to disregard."

Also the case of *Brooke* v. *Croson,* 58 Fed. (2d) 885, record shows:

> "That he, the plaintiff, there met and talked with the defendant about the accident; that defendant then and there made statements whereby defendant admitted that the accident resulted from defendant's own fault; that the substance of defendant's statement was, that defendant was due at the store at 7 o'clock; that defendant was 5 minutes late at the time of the accident; that the plaintiff would not suffer any loss as he, the defendant, was fully insured."

In that case the Court admitted the evidence and refused to exclude it. The admission of that evidence was the sole assignment of error on the appeal. The Court said:

> "In our opinion, the ruling in question was erroneous. It is established by the overwhelming weight of authority that as a general rule it is reversible error in the trial of an action for damages for personal injuries suffered in an automobile accident to permit the plaintiff to introduce evidence to show that the defendant is protected by liability insurance against such accidents. It is held that such evidence is not relevant to the issue of negligence, and can have no effect but to induce a verdict based on the fact that an insurance company, and not the defendant, must pay the award."

In the case of *Clark* v. *Hasselquist,* 304 Ill. App. 41, the Court after quoting the questions and answers of the cross-examination of a witness, said in part concerning the witness Buckley who had testified that he had interviewed witnesses in the case for appellant and for his counsel and who was also asked if he represented anyone else. An objection was then made and counsel said:

Q. "Can you answer that question?"

Witness said:

A. "I can answer it."

Upon request witness said:

A. "The Travelers Insurance Company."

Counsel then made a motion to withdraw a juror which was denied, and the Court of review reversing the judgment of the trial Court, said in part:

> "They succeeded in apprising the jury that appellee, the plaintiff in this suit, who was severely injured as a result of this collision while riding as a guest of appellant, was interviewed by a party who was investigating the case for appellant and for his attorneys and for the Travelers Insurance Company and that his purpose in procuring a statement from appellee was to help his employer. The liability in the instant case, if any, is primarily that of appellant and it was improper and prejudicial to deliberately

> bring to the attention of the jury facts from which the jury could only infer that their verdict, if they found the defendant guilty, would be satisfied not by defendant but by someone else. Evidence that defendant carries indemnity insurance protecting him from paying any judgment in an action for negligence is not admissible (citation of cases). It is true as counsel for appellee urge that they had a right to show by questions on cross-examination any and all interest of Buckley in the case which might affect the weight and credit to be given his testimony and that it is proper to show the relationship which exists between a witness and the parties to the suit, but here, after Buckley had testified that he was investigating this case for appellant and his attorneys, counsel for appellee assumed he was investigating the case for some other party not a party to this record and his answer disclosed that other party to be an insurance company."

For other cases to the same effect, reference is made to the cases cited under the first division of our brief.

It is submitted that the evidence of liability insurance that got before the jury in the case at bar, was deliberately placed there by respondent for the purpose of influencing the jury and was not as accidental and voluntary in the matter of disclosure as respondent would seem to indicate.

The issue in this case was, whether the petitioner was guilty of negligence or whether the respondent was guilty of contributory negligence, and it should have been tried upon those issues. Although the question of liability insurance had nothing to do with the issues in the case, it was made the main issue notwithstanding repeated objections by petitioner's attorney and repeated admonitions of the Court. The insurance question was constantly, consistently and repeatedly injected into the case by the re-

spondent. This is not a small and unimportant matter. Not only the parties, but the whole public is interested in fair and impartial trials in our courts of justice and upon the issues presented by the pleadings. As said by this Court upon that subject in the case of *New York Central Railroad Co.* v. *Johnson*, 279 U. S. 310, 318; 73 L. Ed. 706, 710:

> "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never, as respondents in their brief argue this one was, 'purely a private controversy * * * of no importance to the public.' The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence. The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice."

CONCLUSION.

Petitioner respectfully submits that the decision of the Circuit Court of Appeals in the case at bar is in conflict with the decision of other Circuit Courts of Appeal in principle as shown above, and is also inconsistent with the decisions of the Courts of the State of Illinois on the same subject, as shown by the cases cited in the petition. That the evidence of liability insurance put into the case at bar by the respondent, did not tend to prove any material issue in the case and was not innocently volunteered by the witness, and that the judgment of both lower courts be reversed and the cause remanded to the District Court for a new trial.

Respectfully submitted,

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